THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

SURETYSHIP. — STATUTE OF FRAUDS. — PROMISES MADE ON A NEW CONSIDERATION. — *From Professor Langdell's Lectures.* — The class of cases like *Williams* v. *Leper*, 3 Burr. 1886, in which A, a creditor of B, gives up a lien or other security in exchange for C's promise to pay the debt of B, have brought much confusion into the subject of suretyship. For example, when the consideration thus given by A inures to C's benefit, the rule has sometimes been laid down (as in New York, in *Leonard* v. *Vredenburgh*, 8 Johns. 29) that C's promise is taken out of the Statute of Frauds, section 4, as a matter of law; and even when the consideration inures to B's benefit the view has been put forward (see the dissenting opinion in *Mallory* v. *Gillett*, 21 N. Y. 412) that the mere fact of the plaintiff's giving up a security takes the case out of the statute. The principles, however, which govern the case are in reality simple. It was perfectly possible for C to make a promise of suretyship, *i.e.*, to incur an obligation collateral to B's; the sole question is whether he intended to do so. He may have meant to make a collateral promise, or he may have meant to *assume* B's debt and to become himself the principal debtor, in which latter case his promise, not being one of suretyship, would not properly be within the Statute of Frauds. (It is true that it is not legally possible, in spite of the *dictum* of Buller, J., in *Tatlock* v. *Harris*, 3 T. R. p. 180, for C to step into B's shoes and assume his debt; but such may none the less be his intention.) This question of intention is one of fact, belonging to the jury, and not, as Lord Eldon seems to have thought in *Houlditch* v. *Milne*, 3 Esp. 86, to the court. It is in this aspect only, as bearing on C's intention, that the inquiry to whose benefit the consideration inured becomes material. When a promise is made to pay the debt of another and to pay it as his debt, the intention to make a collateral promise may naturally be inferred unless there is evidence to the contrary. Such evidence may be found in the fact that the consideration inures to the promisor's benefit; but it is by no means conclusive, and must be considered in connection with all the other circumstances of the case. That it is not conclusive is shown by the promise of a guaranty company, which, though made upon a new consideration inuring to the benefit of the company, is manifestly a promise of suretyship.

Where the consideration inures to B's benefit it is not clear why the mere fact that a security is given up should tend to show that C's promise is not one of suretyship. Some right must be relinquished by A in order to constitute a consideration for the promise; and there seems to be no special significance in the fact that the right is a lien or other security. If the security, *e.g.*, goods distrained by A as landlord, should be given by A to C as his bailiff to sell and to pay the plaintiff's claim out of the proceeds, the Statute of Frauds would obviously not apply; but such a transaction is very different from an

absolute promise by C to pay B's debt, which was the case in *Williams* v. *Leper*.

One reason why the courts have shown a disposition to take out of the Statute of Frauds promises made upon a new consideration inuring to the promisor's benefit is probably that where there is a new transaction, a bargain made and consideration given, there is less danger of the frauds which the statute was designed to prevent. But when the promise is one of suretyship, it is so plainly within the words of the statute that it cannot be taken out merely because it is not within the spirit.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMIRALTY — CONTRIBUTORY NEGLIGENCE — DIVISION OF DAMAGES. — A longshoreman while loading a vessel was injured, partly through his own negligence, partly through the negligence of the vessel. *Held*, in spite of his contributory negligence, he can recover for part of the damage. Courts of admiralty act upon "enlarged principles of justice, and are not bound by the positive boundaries of mere municipal law."

This case is the first in which this exact point had been presented to the Supreme Court, but the doctrine of divided damages had already been extended by that court to claims other than those for damages to the vessels which were in fault in a collision. *The Max Morris* v. *Curry*, 11 Sup. Ct. Rep. 29.

BILLS AND NOTES — ANOMALOUS INDORSER. — An inland bill of exchange was indorsed by a third person before its delivery to give the bank the security of an additional name. The indorser intended to assume the liabilities of an indorser only, while the bank intended to hold him as a surety; but there was no agreement on the point. *Held*, that in the absence of agreement he was liable as an indorser only and must have notice, and what the bank intended was immaterial. *De Pauw* v. *Bank of Salem*, 25 N. E. Rep. 705 (Ind.).

BILLS AND NOTES — DOMICILED NOTE. — If a depositor makes a note payable at his bank and the bank pays it, the bank is entitled to set off the note in an action brought by the depositor for the balance due him; but *semble* the bank is not liable to the depositor for a failure to pay such a note. *Bedford Bank* v. *Acoam*, 25 N. E. Rep. 713 (Ind.).

CONFLICT OF LAWS — POWER OF ATTORNEY. — Where an authority is given in a foreign country to an agent to transact business for his principal in other countries, it must be construed, in the absence of evidence of a contrary intention, according to the law of the place where the business is to be transacted. *In re Brazilian Telegraph Co.*, 39 W. R. 65 (Eng.).

CONSTITUTIONAL LAW. — The term "grand jury" had a well-understood meaning when the declaration of rights in the Constitution of North Carolina was adopted, and one of its most essential features was that the concurrence of at least twelve of its members was necessary to the finding of an indictment. Therefore where the Constitution provides that a "criminal indictment must be found by a grand jury," an act of the Legislature making the concurrence of nine members sufficient is unconstitutional. *State* v. *Barker*, 12 S. E. Rep. 115 (N. C.).

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — SPECIAL APPEARANCE. — Texas statutes provide that a special appearance by a non-resident defendant for the purpose of pleading to the jurisdiction is a voluntary appearance which brings defendant into court for all purposes. *Held*, the statutes are valid. They do not deprive a person of life, liberty, or property without due process of law.